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JOHN F. DAVIS, CLERK

NO. 405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

MOTION TO DISMISS

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Appellee, the State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves that the above cause be dismissed on the grounds that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the Statutes and Rules governing appeals to this Court and does not present a substantial federal question.

STATEMENT

This is an appeal from a final judgment of the County Court at Law, No. 1, of Travis County, Texas, entered on April 7, 1967, in which Appellant was convicted of the offense of being in a state of intoxication in a public place, and imposing upon him as punishment therefor a fine of $50.00. The County Court at Law, No. 1, of Travis County, Texas, acquired jurisdiction of this case by way of appeal from the Corporation Court of the City of Austin, Texas. Article 4.03 of the Texas Code of Criminal Procedure limits any further appeals of cases appealed from an inferior

Court to a County Court at Law when the fine imposed by the County Court at Law does not exceed $100.00.

Appellant is enlarged upon bond pending the appeal to this Court and the question presented by the appeal is:

> "Whether the conviction of a chronic alcoholic for being in a state of intoxication in a public place violates the Eighth and Fourteenth Amendments to the United States Constitution."

The Statute (Art. 477, Vernon's Penal Code of Texas) under which Appellant was convicted appears as follows:

> "Art. 477. DRUNK IN A PUBLIC PLACE. Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

The Appellant at his de novo trial in the said County Court at Law No. 1, from which this appeal is taken, based his sole defense on the ground that the Appellant was a chronic alcoholic and, therefore, not amenable to the strictures of said Article 477. The Judge of said County Court at Law No. 1 refused to consider chronic alcoholism as a defense to said Article 477, even though he found the Appellant to be then and there afflicted with the disease of chronic alcoholism.

An appeal or application for writ of certiorari from the final judgment of a State Court is governed by Section 1257, Title 28, United States Code, which reads as follows:

> "§1257. State courts; appeals; certiorari. Final judgments or decrees rendered by the highest court

of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

ARGUMENT

There is no question in this case concerning the validity of a treaty or statute of the United States in which the decision is against its validity, nor is there any contention in this case drawing in question the validity of a State statute on the ground of its being repugnant to the Constitution, treaty or the laws of the United States.

Appellant relies on the case of *Largent v. Texas*, 318 U.S. 418 (1943) in his effort to establish the jurisdiction of his appeal to this Honorable Court. In the Largent case this Court struck down a municipal ordinance which left the granting or withholding of permits for the distribution of publications in the discretion of municipal officers, holding that this was admin-

istrative censorship in an extreme form and that it abridged the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment. Clearly the validity of the statute involved was in question in the Largent case, but in the case at bar, the sole question involved is the right of Appellant to assert the defense of chronic alcoholism.

In Appellant's effort to establish the substantiality of the question presented by him, he cites the cases of *Driver v. Hinnout,* 356 F.2d 761 (4th Cir. 1966), and *Easter v. District of Columbia,* 361 F.2d 50 (D.C. Cir. 1966).

The Driver case was a habeas corpus appeal and the Fourth Circuit Court of Appeals held therein that the state could not stamp an unpretending chronic alcoholic as a criminal if his drunken public display was involuntary as a result of disease. The Easter case was an appeal to the District of Columbia Circuit Court of Appeals from a conviction of public intoxication and such Court held that chronic alcoholism was a defense to a charge of public intoxication and therefore, not a crime, but such holding was explained by one of the Circuit Judges of said Court as follows: "We may, in my view, summon this defense into being because we have both the authority and the duty to shape the criminal jurisprudence of the District of Columbia in accordance with civilized notions of justice. We are not like the ten other federal Courts of Appeals, whose authority over state criminal law derives only from the commands of the Constitution." Neither of the decisions in these cases attempted to construe the validity of the statute involved—they merely held that chronic alcoholism was a defense thereto.

Therefore, Appellant has not placed himself under the terms of said Section 1257, Title 28, United States Code, in order to entitle him to reach this Honorable Court by way of appeal or certiorari, because the only question raised by Appellant does not form a basis for an Appeal to this Court.

Appellant attempts to draw in question the validity of said Article 477 of the Texas Penal Code making it an offense for *any* person to appear in a public place or private house not his own in a state of intoxication but his only argument presented therefor is that one class of persons is exempt from the rigors of said Article, i.e., chronic alcoholics. In other words, he is complaining of the action of the trial judge in not accepting his defense to a charge of violating Article 477.

Appellant's contentions seems to be that chronic alcoholism, being a disease, destroyed the will of Appellant so as to render him unable to form an intent to commit a crime or to resist his impulse to drink to excess and to appear in public intoxicated, consequently he contends that Appellant could not violate the terms of said Article 477, and, a priori, *said Article 477 of the Texas Penal Code is totally invalid.* We think this argument is on a par with one in which a person charged and convicted of murder in spite of his defense of insanity, who claimed the murder law invalid in all respects because he was convicted thereunder without a submission of his insanity defense to the jury. We would agree that such a judgment of conviction would be subject to direct and/or collateral attack in any court of proper jurisdiction, but we will not agree that it would entitle the convicted felon to have his case reviewed by this Honorable Court by way of appeal

or certiorari under the terms of said Section 1257, Title 28, United States Code.

As indicated above the sole question presented by Appellant in his jurisdictional statement is that he was not allowed the defense of chronic alcoholism to the charge of being drunk in a public place. This issue does not present a proper subject for a review by this Court by way of appeal or certiorari from a state court of last resort.

It is respectfully submitted that the appeal presents no substantial question for review by this Court and that this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert L. Lattimore, Assistant Attorney General of the State of Texas, one of the Attorneys for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss has been served upon Mr. Don L. Davis, Attorney for Appellant, by depositing same in the United States Mail, Certified, Postage Prepaid, addressed to Mr. Davis at 214 Austin National Bank Bldg., Austin, Texas 78701, this the 2nd day of August, 1967.

R. L. Lattimore

ROBERT L. LATTIMORE
Assistant Attorney General